Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

ROBERT B. SMITH III
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51pp

QUESTIONS PRESENTED

1. Did the federal debarment to do business with the United States Government bar subsequent criminal prosecution under the Fifth Amendment Double Jeopardy Clause?

2. Was the evidence insufficient under the Fifth Amendment Due Process Clause to sustain the conviction of embezzlement in that no rational trier of fact could find guilt beyond a reasonable doubt as to the substantive elements of the crime charged?

PARTIES TO THE PROCEEDING

The Petitioner Robert B. Smith III was the president of Delta Mortgage Company at the time of the conviction of embezzlement and prior thereto. He did not own the corporation nor any stock in the corporation. The Respondent is the United States Government.

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Petitioner, Robert B. Smith III, petitions for a writ of certiorari to review the September 9, 1996, Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the judgment entered by the United States District Court for the Western District of Tennessee entered in the District Court September 7, 1995.

OPINIONS BELOW

The judgment of the United States District Court for the Western District of Tennessee entered September 7, 1995, is not published. The Opinion of the United States Court of Appeals for the Sixth Circuit entered September 9, 1996, is not published.

JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on September 9, 1996. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied October 23, 1996.

Petitioner Smith seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The first issue in this application for writ of certiorari involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the second issue involves the Due Process Clause of the Fifth Amendment. See Appendix C.

STATEMENT OF THE CASE

A. Procedural Posture:

The Petition for Writ of Certiorari ("Petition") arises from an indictment by the Federal Grand Jury for the Western District in Tennessee charging the defendant Robert B. Smith III ("Smith") along with his wife, Glynda H. Smith, with a conspiracy to defraud, in violation of Title 18 U.S.C. § 371 (count 1) and in counts 2-32 of a violation of 18 U.S.C. § 657, embezzlement and purloining monies with the intent to injure and defraud the United States Department of Housing and Urban Development and counts 33-61 mail fraud. R1, INDICTMENT

Petitioner Robert B. Smith III and Glynda H. Smith (wife), co-defendant, entered "not guilty" pleas and the case came on for trial with each defendant being represented by separate counsel, the court having ordered that Petitioner Smith's counsel could not represent Glynda H. Smith (Petitioner Smith's wife) at trial. R28, ORDER On February 16, 1995, the District Judge (R53), on motion of the government, dismissed counts 33-61 (mail fraud).

The jury trial began February 21, 1995, and continued from day to day until the jury returned a verdict of guilty February 28, 1995, as to counts 2-32 as to Petitioner Smith. R63, JURY VERDICT On February 27, 1995 (R60), Petitioner's motion for judgment of acquittal as to count 1 had been granted as to both defendants and was also granted as to counts 2-32 as to Glynda H. Smith. Petitioner's motion for judgment of acquittal as to counts 2-32 was denied. R60, MINUTES

DOUBLE JEOPARDY MOTIONS

Petitioner Smith filed a pretrial motion to dismiss the indictment on grounds of double jeopardy, which was denied.

R89, ORDER This motion was renewed post-trial and was denied. A motion for judgment of acquittal under Rule 29(c) was also denied September 1, 1995, along with the motion for new trial. R89, MINUTES

On September 1, 1995, at sentencing, the District Judge sentenced Petitioner Smith to 22 months imprisonment on each count, to be served concurrently, followed by three years supervised release. R89, MINUTES; see, also, R92, JUDGMENT IN A CRIMINAL CASE. The judgment was entered September 7, 1995, and on September 6, 1995, a Notice of Appeal was timely filed. See R93, NOTICE OF APPEAL.

On September 9, 1996, the United States Court of Appeals for the Sixth Circuit filed its decision affirming the judgment of the United States District Court for the Western District of Tennessee. Petitioner Smith petitioned the court for a rehearing pursuant to Rule 40 of the Fed.R.App.P. and made a Suggestion for Rehearing *En Banc* pursuant to Rule 35(b) of the Fed.R.App.P. On October 23, 1996, the United States Court of Appeals for the Sixth Circuit entered an order denying the Petition for Rehearing and the Rehearing *En Banc*.

B. Facts:

Petitioner Robert B. Smith III was the president of Delta Mortgage Company, Jackson, Tennessee. He was an honest, law-abiding citizen, in the mortgage lending business, primarily as president of Delta Mortgage Company. Smith was not a stockholder of Delta Mortgage. He had been a reputable and successful mortgage lender for thirty-five (35) years. In the 1990s, the corporation failed to timely remit to the government, United States Department of Housing and Urban Development (HUD) One-Time Mortgage Insurance Premiums (OTMIPs). Smith discovered the error after-the-

fact. By letter dated July 29, 1991, the president (Smith) [exhibit #48, Vol. 4, p.525], acknowledged this failure of the corporation to J.I. Kislak Corporation of Miami Lakes, Florida. On August 1, 1995, Smith as president executed a secured corporate promissory note [real estate with trust deed] on behalf of Delta Mortgage Company in the amount of $51,169.66 [VOL.5 p.683, EXHIBIT #C42, p.321] payable to the J.I. Kislak Mortgage Corporation in return for the promise of Kislak to remit monies to cover the OTMIPs that had not been timely remitted by Delta Mortgage. TR, TRIAL, SMITH, VOL.5, 2-27-95, p.681; TR, TRIAL, LUKE, VOL.4, 2-23-95, pp.524-526

On August 7, 1991, the Petitioner Smith, as president of Delta Mortgage Company, sent an almost identical letter [Exhibit #47, Vol.4, p.499] to U.S. Mortgage Servicing Corporation of St. Petersburg, Florida, and then, on September 3, 1991, acting as president, he executed a corporate promissory note payable to U.S. Mortgage Servicing Corporation in the amount of $29,500 [VOL.5, p.682; EXHIBIT #43; p.321 and p.473], with the promise that the OTMIPs not paid by Delta, and chargeable to U.S. Mortgage, would be paid by U.S. Mortgage. This note was later canceled and marked "paid in full" "3-30-94". TR, TRIAL, SMITH, VOL.5, 2-27-95, p.682; TR, TRIAL, LUKE, VOL.3, 2-22-95, p.277; pp.295-321; TR, TRIAL, WALL, VOL.4, 2-23-95, p.469; pp.472-492 At the time of the trial, the other corporate note secured by trust deed had not been paid.

At this point (1991) there had been no law enforcement activity or investigation whatsoever. On August 8, 1991, the Federal Housing Administration (FHA) in Washington, D.C., was notified by an employee of Kislak of the problem or the failure to timely remit the OTMIPs [TR, TRIAL, MCCOACH, VOL.4, 2-23-95, P.451], but it was not until seven months later in April, 1992, that HUD

auditor(s), and an agent, Thomas E. Luke, from the U.S. Office of Inspector General (OIG) (HUD) arrived on the premises of Delta Mortgage in Jackson, Tennessee, to investigate. TR, TRIAL, LUKE, VOL.3, 2-22-95, pp.276-277 Smith was interviewed by two agents and they obtained a statement by Smith to one agent (Helen Broyles) without the other agent being present, and then another statement immediately followed that same date, with Smith being interviewed in a conversation with agent Thomas E. Luke and Helen Broyles. TR, TRIAL, BROYLES, VOL.2, 2-21-95, p.133; TR, TRIAL, LUKE, VOL.3, 2-22-95, p.277; pp.295-371

The purpose of the investigation by Luke was to determine whether Smith had embezzled or wilfully misapplied funds or OTMIP premiums collected during the closing of FHA-insured loans that were to be paid to HUD for the OTMIPs. TR, TRIAL, LUKE, VOL.3, 2-22-95, pp.212-213 Delta Mortgage Company had been authorized by HUD [the Federal Housing Administration (FHA)] to process FHA-insured residential loans under the direct endorsement program. TR, TRIAL, BROYLES, VOL.2, 2-21-95, p.109

Delta Mortgage Company was thus an "approved direct endorsement lender" [BROYLES, p.109], and during the investigation in April 1992, *supra*, according to Broyles, Robert B. Smith admitted that the OTMIPS had not been timely remitted. [There is no question they were not timely remitted.] However, Broyles's handwritten statement or notes of the conversation could not be produced because she claimed they were "in the archives" in Washington, D.C. She had reported that conversation that same date to AUSA Grinalds who was then prosecuting the case. TR, TRIAL, BROYLES, VOL.2, 2-21-95, p.133-138; pp.153-156

Agent Luke (OIG) also testified to that conversation that same date with Mr. Smith as stated above; however,

Mrs. Broyles was present. This conversation was reduced by Luke to writing in an official report. TR, TRIAL, LUKE, VOL.3, 2-27-95, p.277; pp.295-298; p.313

In both conversations, according to testimony, Mr. Smith denied any "wrongdoing" and neither agent testified that he admitted knowledge of the failure to remit timely the OTMIPs until the "after-the-fact" discovery, and he related that his problems began when the bookkeeper quit. TR, TRIAL, LUKE, VOL.3, 2-22-95, p.313; p.326; TR, TRIAL, BROYLES, VOL.2, 2-21-95, pp.136-137; p.149; p.177

THE DEFENSE

Petitioner Smith testified for the defense and denied all wrongdoing and the claim of any witness to the contrary. He was cross-examined and we contend established very clearly that there was no embezzlement, any crime or wrongdoing. Instead, the corporate failure to timely remit the OTMIPs was that solely of the corporation and its employees.

DOUBLE JEOPARDY

In February 1992, a notice letter was received from HUD to the effect that Robert B. Smith III was barred from doing business with the United States Government and his name was listed in government publications that he was barred, banned or debarred from doing business with any agency of the United States Government. Letters and documents were introduced as OFFER OF PROOF [EXHIBIT #C-1] to show this debarment, both with regard to the pretrial motion as well as the post-trial motions. See TR, TRIAL, 2-21-95, VOL.2, pp.78-79; EXHIBIT C-1, p.85. See R89, MINUTES, 9-1-95.

The double jeopardy motions were denied. TR, p.86; R89, MINUTES

As to the double jeopardy claim, a three-judge Panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court decision, holding, "the primary basis of Smith's argument rests on precedent that has since been overruled," citing *Ursery*. See Argument *infra*.

The three-judge Panel as to the embezzlement conviction, found the evidence to be sufficient, concluding, "it does not strain credibility that a jury could conclude that Smith misdirected money, which belonged to HUD, to his own company," and found that the jury could conclude that Smith acted "fraudulently" because he "covered his tracks" by making photostatic copies of checks that were to be voided ... saying that Smith had not met his "heavy burden" that the evidence was insufficient to sustain his guilty verdict.

ARGUMENT

I.

THE FEDERAL DEBARMENT TO DO BUSINESS WITH THE UNITED STATES GOVERNMENT BARRED UNDER THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE SUBSEQUENT CRIMINAL PROSECUTION.

Petitioner Robert B. Smith III is aggrieved by the failure of the Sixth Circuit three-judge Panel to reverse the District Judge's order denying his double jeopardy claims. During this litigation, the Sixth Circuit's *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995) was overruled by the United States Supreme Court in *United States v. Ursery*, 116 S.Ct. 2135 (1996). Petitioner's case, however, can be clearly distinguished from the Supreme Court's ruling in *Ursery*, which "turned the legal world upside down" by reversing the Sixth Circuit decision as well as a Ninth Circuit decision, *United States v. $405,089.23*. The reversal in *Ursery* was because the separate in rem civil forfeitures were not "punishment" for the purposes of the Double Jeopardy Clause. 116 S.Ct. at 2138 Petitioner's factual situation is quite different as the federal debarment to do business with the United States Government for life was indeed "punishment". The *Ursery* holding is confined to civil "forfeitures". *Id.* The cases reviewed by the court in *Ursery* were civil "forfeiture" cases. "Double jeopardy" is rooted in history and is not an evolving concept. See 116 S.Ct. at 2142. *Ursery* considered whether *Halper* [490 U.S. 435 (1989)], *Austin* [509 U.S. 602 (1993)], and *Kurth Ranch* [511

U.S. ___, 114 S.Ct. 1937 (1994)] accomplished the radical jurisprudential shift (in forfeiture cases) perceived by the Courts of Appeal. 116 S.Ct. at 2143. *Halper*, *Austin*, and *Kurth Ranch* were distinguished; however, these cases are *not* distinguishable in the embezzlement case of Robert B. Smith III: Smith was debarred for life from doing business with the United States Government prior to the criminal conviction.

The cases that the Panel decision relied upon, *DiCola v. Food & Drug Admin.*, 77 F.3d 504 (D.C. Cir. 1996), and *United States v. Bizzell*, 921 F.2d 263 (10th Cir. 1990), are no longer valid authority in view of *Halper*, *Austin*, and *Kurth Ranch*, *supra*.

For the Sixth Circuit Panel to find that a debarment by HUD is a remedial penalty (protecting the public) as stated on page 3 of the Sixth Circuit Opinion misses the point: *Halper*, *Austin*, and *Kurth Ranch* can't be distinguished.

"Civil in rem forfeitures" may not be "punishment" for double jeopardy purposes [but see the strong, well-reasoned dissent of Mr. Justice Stevens at 116 S.Ct. 2152-2163], however, as pointed out clearly by Mr. Justice Stevens, as well as conceded by Mr. Justice Rehnquist, *Halper*, *Austin*, and *Kurth Ranch* certainly establish that "double jeopardy" is applicable in some situations or cases, depending on the facts and circumstances -- such as, we submit, this HUD debarment, embezzlement case of Smith. This is not a drug trafficking case. There is a distinction between "civil forfeitures" and "civil penalties". 116 S.Ct. at 2144. *Various Items* [282 U.S. 577 (1931)], *Emerald Cut Stones* [409 U.S. 232 (1972)], and *89 Firearms* [465 U.S. 354 (1984)] are not applicable to the double jeopardy question in the case of Robert B. Smith III involving a HUD debarment for alleged embezzlement.

The debarment is a "civil penalty" which bears no rational relation to the goal of compensating the government

for "loss". *Halper*. See *Ursery*, 116 S.Ct. at 2144. This is punishment in the plain meaning of the word. *Id.*

A "civil fine" can be a "punishment" under the double jeopardy clause. A civil penalty in a particular case "may be so extreme and so divorced from the government's damages and expenses as to constitute punishment." *Halper*. See *Ursery*, 116 S.Ct. at 2143.

Petitioner is thus aggrieved by the failure of the Sixth Circuit three-judge Panel to reverse the order of the district judge below because he has been punished twice for the same conduct in violation of the Double Jeopardy Clause of the Fifth Amendment.

II.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO WHETHER THERE WAS EVIDENCE SUFFICIENT TO SUSTAIN THE CONVICTION OF EMBEZZLEMENT UNDER THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

Petitioner is also aggrieved by the failure of the Sixth Circuit Panel to set aside the judgment entered in the United States District Court for the Western District of Tennessee, convicting him of embezzlement as defined in 18 U.S.C. § 657. There was no evidence or insufficient evidence to support this conviction of embezzlement and, indeed, the Sixth Circuit Panel applied the wrong standard in reviewing the evidence in view of *Jackson v. Virginia*, 443 U.S. 307 (1979) and the constitutional principle stated therein.

A. The standard of review is established by the Fifth Amendment Due Process Clause.

In *Jackson v. Virginia, supra*, this Supreme Court said that to review on habeas corpus state convictions under the Fourteenth Amendment the standard was:

> No rational trier of fact could reasonably conclude guilt beyond a reasonable doubt.

Jackson v. Virginia, supra held:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.
> ...This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

In re Winship, 397 U.S. 358 (1970) had established that the Fourteenth Amendment Due Process Clause prohibits criminal conviction except upon proof beyond a reasonable doubt. The constitutional standard in a federal case is the same. When the Panel below reviewed the evidence applying the standard "this Court must sustain the jury determination so long as the conviction is supported by substantial evidence," citing *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983), the Sixth Circuit Panel erred.

CONFLICT WITH OTHER CIRCUITS

In fact, the standard of review for sufficiency of the evidence in the Ninth Circuit is that the Court must view the evidence in the light most favorable to the government whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See *United States v. Mares*, 940 F.2d 455, 458 (9th Cir. 1991); *United States v. Quinn*, 18 F.3d 1461, 1465 (9th Cir. 1994); *United States v. Castaneda*, 16 F.3d 1504, 1510-11 (9th Cir. 1994); and *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994).

In *United States v. Ortiz*, 23 F.3d 21, 23 (1st Cir. 1994), the First Circuit applied the standard of whether a rational jury could have found beyond a reasonable doubt that the defendant committed the essential elements of the crime charged in reviewing the sufficiency of the evidence. In *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994), the Second Circuit held: "Not only must the evidence be viewed in the light most favorable to the government and all permissible inferences drawn in its favor [citation omitted], but should the evidence, thus construed, suffice to convince any rational trier of fact that the crime charged has been proved beyond a reasonable doubt, then the conviction must stand." The Fifth Circuit held in *United States v. Pettigrew*, 77 F.3d 1500, 15518 (5th Cir. 1996), that a conviction could be affirmed if "viewing the evidence and the inferences that may reasonably be drawn from it in the light most favorable to the verdict, a rational trier of fact could have found that the evidence establishes the defendant's guilt beyond a reasonable doubt." The Seventh Circuit in *Bergman v. McCaughtry*, 65 F.3d 1371, 1378 (7th Cir. 1995), said that a conviction must be overturned if "viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." In *United States v. Warren*, 18 F.3d 602 (8th Cir. 1994), the Eight Circuit said that the court must affirm a conviction unless it concludes "that a reasonable fact-finder could not have found guilt beyond a reasonable doubt." There appears to be a conflict among the circuits but, also, it appears that the *Jackson v. Virginia* standard to be applied in state courts is also being applied in some federal circuits.

WRONG STANDARD OF REVIEW APPLIED BY SIXTH CIRCUIT PANEL IN ITS OPINION

The Sixth Circuit Panel applied the wrong standard of review. This is the first question to be addressed. While we do not dispute that in reviewing the sufficiency of the evidence to support a conviction, the appeals court should view the evidence in a light most favorable to the prosecution, [see, e.g., *United States v. Head*, 927 F.2d 1361, 1365 (6th Cir.), *cert. denied*, 112 S.Ct. 144 (1991) and *United States v. White*, 788 F.2d 390, 393 (6th Cir. 1986)]. The "substantial evidence" standard is no longer valid in federal cases. See *Glasser v. United States*, 315 U.S. 60 (1942). If a challenge to a conviction in a state court on the grounds that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim, *Brown v. Davis*, 752 F.2d 1142, 1144 (6th Cir. 1985), citing *Jackson v. Virginia*, 443 U.S. 307, 322 (1979), then there should be the same standard for review under Fifth Amendment Due Process as there is under Fourteenth Amendment Due Process. This indeed was the first error in the Opinion of the Sixth Circuit Panel that found sufficient evidence against Petitioner Smith to sustain his criminal conviction.

Petitioner argued in his Sixth Circuit brief below that the standard of review was this Due Process standard. See pp. 18-19, APPELLANT'S BRIEF.

B. Application of the Standard of Review to Smith's Embezzlement Conviction

Applying the standard of review, no rational trier of fact could reasonably conclude guilt beyond a reasonable doubt, it must first be noted that the failure to timely remit

the One-Time Mortgage Insurance Premiums (OTMIPs) was that of the *corporation*, and not that of the *individual*, its president, Petitioner Smith. Because Smith was an individual and not the corporation, the proof under this review simply fails to establish the elements of the federal statutory crime charged under 18 U.S.C. § 657.

1. The Theory of the Defense as to the Embezzlement Charges

In counts 2-32, the indictment charged embezzlement or that Robert Smith "knowingly and wilfully" "embezzled and purloined" monies of the United States Department of Housing and Urban Development (HUD) in violation of 18 U.S.C. § 657. The alleged crime was allegedly committed acting as an "agent" for HUD. This crime is defined in 18 U.S.C. § 657:

> Whoever, being an officer, agent or employee of or connected in any capacity with ... any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ... embezzles, abstracts, purloins or wilfully misapplies any monies, funds, credits, securities or any things of value belonging to such institution, ... shall be fined not more than $1,000,000 or imprisoned not more than twenty years or both ...

At the conclusion of the government's proof, Smith moved for acquittal which was granted as to count 1 (pp.653-654) as to both defendants but denied as to counts 2-32. TR, TRIAL, VOL.5, 2-27-95, p.652 At the conclusion of the entire case, Smith moved again for judgment of acquittal which was denied, and then post-trial under Rule 29(c) Smith moved for judgment of acquittal which was denied September 1, 1995. See TR, VOL.6, p.863-864

Under attack now for insufficiency of evidence are the convictions, counts 2-32. As set forth in the indictment, each of these counts claims as follows and the issue is the same as to each count with respect to the claim of insufficiency of evidence. The counts claim that Robert B. Smith III and Glynda H. Smith (acquitted), being president and vice president, respectively, of Delta Mortgage Company, each being:

> aided, abetted, counseled and induced by the other, and acting as agents of the United States Department of Housing and Urban Development, an agency of the United States Government, with the intent to injure and defraud the United States Department of Housing and Urban Development, did knowingly and wilfully embezzle and purloin a check made payable to the United States Department of Housing and Urban Development... entrusted to the defendants' care for delivery to the United States Department of Housing and Urban Development in violation of Title 18 U.S.C. §657 and §2.

We attack each of these embezzlement[1] convictions (counts 2-32).

A crime is any social harm defined and made punishable by law. Each crime (federal or state) has substantive definition or elements. Failure to establish any one of the elements is a failure of proof and grounds for reversal of the conviction. We attack the conviction(s) of embezzlement on five different grounds for failure to prove element(s).

i. NO PROOF ROBERT B. SMITH III WAS AN AGENT

> Question: (Mr. Grinalds) Now, in this particular case, did Delta Mortgage Company, were they involved as a lender for HUD?
>
> A. Yes, Sir, they were.
>
> Q. And what was their agency relationship to HUD?

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1 In substantive criminal law, embezzlement and purloin (species of larceny) lay side by side with "purloin" filling the gap between embezzlement on the one hand and larceny on the other and with "purloin" meaning underhanded, stealth, sly, clandestine, or secret means, but since there was no evidence whatsoever of trespass and to simplify petitioner's counsel will use the term "embezzlement". [For an interesting account of "purloin" see Edgar Allen Poe's (1840-1849) *The Purloined Letter*.]

The term "purloin" is another vague concept which ought to go the way of the dodo bird and the dinosaur, but for some reason or another, federal law holds on to this ancient, vague concept.

A. They were an approved direct endorsement lender.

Q. All right, explain to the ladies and gentlemen of the jury what a direct endorsement lender is.

A. A direct endorsement lender is really an extension of HUD. They have the authority to originate and close FHA loans without any review by the Department of Housing and Urban Development. They do the full package.

Helen Broyles, HUD, 20 Years
TR, TRIAL, BROYLES, VOL. 2, 2-21-95, p109

Petitioner Smith contests the government's claim and proof that he was "an agent" of the "United States Department of Housing and Urban Development." He was an individual and the president of a corporation that was a corporate agent of HUD. That is, Delta Mortgage Company was approved as a "mortgagee" [see TR, TRIAL, BROYLES, VOL.2, 2-21-95, p.109, quoted, *supra*. See, also, TR, TRIAL, LUKE, VOL.3, 2-27-95, pp.349-350: corporation approved by FHA 9-21-77, FHA #494198] Robert B. Smith III was never an "agent" himself -- by any stretch of the imagination -- under any definition -- of the United States Department of Housing and Urban Development. He was simply the *president* of the corporation. Mr. Smith was not an agent of HUD as alleged as an element of the crime in the Indictment. Thus, there was a failure of the proof.

A penal statute, each and every element thereof, must be strictly construed. *United States v. Enmons*, 410 U.S. 396 (1973)

ii. NO PROOF OF AN EMBEZZLEMENT BY ROBERT B. SMITH III

To "embezzle" means voluntarily and intentionally to take or to convert to one's use the property of another, which property came into the defendant's possession lawfully. This is the definition of embezzlement at common law[2], and it applies to this indictment. Even construing the evidence in the most favorable light to the government, there was absolutely no proof that any appropriation of money as a result of the failure to timely remit the OTMIPs by Smith the individual was for was for the personal use and benefit of the

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2 The English Parliament created new statutory crimes of embezzlement and false pretenses to plug the loopholes discovered in the law of larceny. American states followed, recognizing three separate crimes. Merger of the common law offenses was a constructive step in law because the distinctions between larceny, embezzlement, and false pretenses serve no useful purpose and are useless handicaps in the administration of criminal justice. But combining them in a single statute does not authorize punishment of what did not previously constitute guilt of any one. *People v. Karp*, 216 N.E.2d 817 (N.Y. 1948); *People v. Jones*, 224 P.2d 353 (Cal. 1950)

Under consolidation statutes, if any one of the crimes is supported by sufficient evidence, the defendant may be found guilty although there is authority to the contrary. See *Cameron v. Hauck*, 383 F.2d 966 (5th Cir. 1967); see and compare, *Norton v. United States*, 92 F.2d 753 (9th Cir. 1937) [extortion versus false pretenses or defraud].

defendant Smith as opposed to a third party -- the corporation. See *United States v. Williams*, 478 F.2d 369 (4th Cir. 1973); *United States v. Northway*, 120 U.S. 327 (1887); *United States v. Angelos*, 763 F.2d 859, 861 (7th Cir. 1985); *United States v. Steffen*, 641 F.2d 591, 597 (8th Cir. 1981); and *United States v. Beran*, 546 F.2d 1316, 1320 (8th Cir. 1976).

There was no personal use or benefit. See TR, TRIAL, BROYLES, VOL.2, 2-21-95, pp.175-76; TR, TRIAL, SMITH, VOL.6, 2-27-95, p.659 et seq., TR, TRIAL, LUKE, VOL.3, 2-22-95, p.279; pp.312-313.

A penal statute, each and every element thereof, must be strictly construed. *United States v. Enmons*, 410 U.S. 396 (1973) See *United States v. Best*, 731 F.Supp. 833 (M.D.Tenn. 1990) [reversed]; *United States v. Blackmon*, 839 F.2d 900, 904-07 (2d Cir. 1988) [reversed]; *United States v. Ratchford*, 942 F.2d 702, 706 (10th Cir. 1991). A bank messenger receiving money to take from the bank to one of its branches has custody only and is guilty of larceny if he appropriates the money. *United States v. Pruitt*, 446 F.2d 513 (6th Cir. 1971)

A penal statute, each and every element thereof, must be strictly construed. *United States v. Enmons*, 410 U.S. 396 (1973)

iii. NO PROOF OF INTENT TO INJURE BY ANYONE

Furthermore, as a matter of logic and proof, there was no "intent to injure and defraud" the United States Department of Housing and Urban Development by knowingly and wilfully embezzling and purloining. There was no showing of intent to injure the United States Government as intent is defined to mean "to cause pecuniary loss." *United States v. Arthur*, 544 F.2d 730, 736 (4th Cir.

1976); see also *United States v. Blackwood*, 735 F.2d 142, 144-46 (4th Cir. 1984). And, see, *United States v. Cooper*, 577 F.2d 1079, 1082-83 (6th Cir. 1978), *cert. denied*, 439 U.S. 868 (1978) and *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975).

The government could have charged the defendant with "misapplication" under Section 657 or allege that he diverted funds for the use of others, the corporation, Delta Mortgage Company. [Misapplication and embezzlement are separate and distinct offenses. See *United States v. Holmes*, 611 F.2d 329, 331 (10th Cir. 1979).] But, this wasn't the charge in the Indictment. At best the proof shows that he was negligent or careless or that some person or persons in the corporation were negligent or careless in the handling of the monies that he discovered had been misapplied after-the-fact. See his letters, TR, TRIAL, SMITH, p.___. Also, recall that the statements taken by Helen Broyles and agent Luke in their investigation in no way establish that there was any intent or plan but instead support the defense contention that the discovery of the errors was after-the-fact -- taking the evidence in the best light to the government.

This conviction ought to be reversed and set aside and Smith set free on this ground alone.

The testimony of Bob Smith was that the corporate bookkeeper quit. TR, TRIAL, SMITH, VOL.6, 2-27-95, p.659 et seq. TR, TRIAL, LUKE, VOL.3, 2-27-95, p.213, et.seq. In hindsight, Mr. Smith failed to protect the corporation by immediately hiring another good bookkeeper. He needed professional assistance. There must be a system of checks and balances in any business to avoid errors. A software program could have prevented the errors. A monthly review of office records would have been advisable. But, accounting mistakes are not crimes. As Alexander Pope

said long ago, "It is human to err." Error is not necessarily criminal.[3]

A penal statute must be strictly construed and each and every element thereof. *United States v. Enmons*, 410 U.S. 396 (1973)

iv. NO PROOF OF WILFULNESS

There was no proof of "wilfully" embezzling as charged in the Indictment. See *Ratzlaf v. United States*, 114 S.Ct. 655 (1994). Since "wilfully" was an element of the

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3 See *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996) where the Eleventh Circuit Court of Appeals reversed the multiple mail fraud convictions of four, former top executives of General Development Company. They were convicted of defrauding homebuyers by allegedly misrepresenting the resale value and rental income which could be derived from properties. On both legal and factual grounds, the Court rejected the prosecution's theory of the case, holding that, although the defendants may have engaged in sharp and exploitative business practices, they did not commit any crimes. "The fraud statutes do not cover all behavior which strays from the ideal," the Court observed, and "Congress has not yet criminalized all sharp conduct, manipulative acts or unethical transactions." *Id.* at 1562 Quoting John Stewart Mill, the Court reminded the prosecution that "there are ... things ... which we wish that people should do, which we like or admire them for doing, perhaps dislike or despise them for not doing, but yet admit that they are not bound to do so." *Id.* The Panel also invoked the words of Sir Thomas More: "The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely." *Id.* at 1562 "To be free of tyranny in a free country," the Court added, "the causeway's edges must be clearly marked." *Id.* The decision signals the emerging sensitivity toward the evils of expansive mail fraud prosecutions.

crime, there must have been some evidence in order to support the conviction that Robert Smith III knew the failure of the corporation to timely remit OTMIPs was a crime or unlawful and failed to remit the monies wilfully in violation of federal criminal law. There must have been some proof he knew he was violating the law. There was none. The conviction should be reversed on this ground alone.

A penal statute, each and every element thereof, must be strictly construed. *United States v. Enmons*, 410 U.S. 396 (1973)

IGNORANCE OF THE LAW

Ignorance of the law is often said to be no excuse. [Ignorantia juris non excusat.] This is an often-quoted legal maxim, however, Mr. Justice Douglas in *Lambert v. California*, 355 U.S. 225 (1957), while noting that "ignorance of the law will not excuse," oddly enough, found the defendant's ignorance of the law to be an excuse in that her due process rights were violated. [In *Lambert*, the defendant was given insufficient notice of a law requiring her to register as a person with a criminal record.]

A recent Supreme Court case provides another example of where ignorance of the law can be an excuse. In *Cheek v. United States*, 498 U.S. 192 (1991), the Supreme Court found that a good-faith misunderstanding of the law can negate wilfulness. Cheek, an airline pilot, was convicted of six charges of failing to file income tax returns and for tax evasion. He argued, at one point in his appeal, that he believed his actions were lawful and Mr. Justice White, writing the opinion for the majority, stated that the term "wilfully" as used in federal criminal tax offenses served to "carv[e] out an exception to the traditional rule" that ignorance of the law or mistake of law is no defense to criminal prosecution. *Id.* at 200.

The Supreme Court found that the jury may rightfully determine whether the defendant acted wilfully. Thus, pursuant to *Cheek*, a defendant may now be entitled to an instruction being given to the jury in a federal tax evasion case on the issue of whether the accused acted wilfully. The Court in *Cheek* notes that "[t]his special treatment of criminal tax offenses is largely due to the complexity of the tax laws." *Id.* at 200. The Supreme Court, however, in *Ratzlaf v. United States*, *supra*, quoted above, recently extended this holding to require knowledge on the part of a defendant charged with structuring money transactions to evade reporting requirements.

Thus, in *Cheek*, the standard for the statutory wilfulness requirement was the voluntary, intentional violation of a known legal duty with wilfulness requiring the government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. See, also, *Staples v. United States*, 114 S.Ct. 1793 (1994) in that *Staples* held that an element of the charge of possession of a registered is that the defendant knew that the gun was a machinegun (automatic as opposed to semiautomatic). Also, see the Seventh Circuit Opinion *United States v. Obiechie*, 93-3012, October 14, 1994, where the court held that to satisfy the "wilful" element of 18 U.S.C. § 924(a)(1)(d), the government must prove that a defendant *knew* that engaging in the business of dealing in firearms without a license is illegal. In *Obiechie*, the District Court had concluded that "wilful" meant intending to do the acts that constituted the crime rather than knowing of the law and intending to violate it.

In the case *sub judice*, Delta Mortgage Company handled millions of dollars of funds and closed thousands of loans under very complex and onerous rules and regulations of the United States Government. They are so complex that

their explanation was not even attempted at the trial below. How can the corporate president of such a corporation under such circumstances be held criminally liable for a federal crime because some monies were not timely remitted? [In fact, 90 percent of the OTMIPs were timely paid by the corporation.]

When the first United States Congress met in 1789, there were only three federal crimes: treason, counterfeiting currency, and smuggling to avoid tax. Today, Congress passes more than 2,500 statutes each year, and the bureaucracies Congress has spawned churn out more than 65,000 pages of regulations that carry the force of law. Many of these statutes and regulations impose criminal sanctions for their violation, but how can anyone be expected to know all the intricacies of such statutes, rules and regulations of the United States Government [particularly, U.S. Housing and Urban Development and FHA] and the handling of such mortgages as in this case.

v. FAILURE OF PROOF AS TO FIRST TENNESSEE BANK LOANS

As a final ground, some of the convictions on some of the counts simply fail as to the claim that the OTMIPs were not paid. The government chose to introduce a witness from First Tennessee Bank, but the loans actually involved "Valley Bank" and therefore this testimony failed to prove the failure to pay the OTMIPs. See TR, TRIAL, MCNAMARA, VOL.4, 2-23-95, pp.536-537. How can Mr. Smith be held accountable for failure to pay OTMIPs for these loans in these counts under these circumstances? In fact, the proof was very confusing and certainly does not meet the burden of proof required by due process -- *Jackson v. Virginia*, *supra*.

2. Specific Flaws in the Sixth Circuit Opinion Itself

The sole function that Robert B. Smith III performed for HUD was to approve or reject FHA loans for his employer, Delta Mortgage. Delta Mortgage deposited all monies in Delta Mortgage's bank accounts and it was Delta Mortgage that received the benefit (if any) from this FHA premium and not Robert B. Smith personally. Smith was not even a stockholder.

On page 4 of the government's brief below, the government talks about Smith paying for *his* utilities and *his* rent. On page 2 of the Sixth Circuit Opinion, it seems the Panel then concluded it was *his* when it was in fact by proof payment of expenses of the corporation Delta Mortgage. Smith did not own the corporation, and it was not a sole proprietorship. There was no evidence that he kept the OTMIPs to pay any personal obligations. Thus to find in the Opinion that he used the money for his own personal utilities and his own personal rent defies the evidence and fails to make the distinction between the corporation and the individual. This was error.

The FHA approved mortgagee was Delta Mortgage -- not Robert B. Smith III. There is a misconception in the Opinion of the "agency" concept in this case. See Sixth Circuit Opinion, p.4.

For example, Doris Walls testified (page 10, government's Brief) that "they agreed to allow the defendant, Robert Smith, to pay $18,000." Again, this argument fails to make the distinction between the corporation and individual, and misled the Panel. Petitioner Smith did not owe $18,000. He was acting as the president of Delta Mortgage in that telephone conversation with Wade Walls.

Delta Mortgage had the authority to deposit, and Delta Mortgage maintained the escrow account -- legally -- under HUD regulations.

There was never any evidence that Smith used HUD money *personally* or that the money was delivered to him *personally*.

The checks were not "entrusted to him," as HUD never entrusted checks to Smith, but rather they were entrusted to Delta Mortgage, and they were deposited into an established *corporate* FHA escrow account. There was absolutely no evidence that the government or HUD had ever objected to the use of the FHA escrow account when they obviously knew for years there was such an account. Again, Robert B. Smith was not the FHA approved mortgagee -- Delta Mortgage was the approved mortgagee.

Petitioner Smith was simply the president of the corporation. There were numerous employees or agents in the corporation that operated the business. As president, he had to promote sales, work with realtors, and to process and approve or reject all types of loans -- not just HUD transactions. After a loan was approved, the handling of the paperwork became a routine clerical function that was not a function that Smith performed. Petitioner Smith never prepared deposit slips, never signed any of the FHA insurance premium checks, and never submitted the loan packages to the investors. He was spending, according to his testimony, 60 to 70 hours per week in a desperate effort to help his employer (Delta Mortgage) survive the critical economic times of 1990 and early 1991. He did not put money into his business account. He did not own any stock in Delta and did not deposit checks in any bank account. He did not write or sign the OTMIP checks in question and did not "hold" them in the files. It was error to ascribe to Smith the conduct of corporate employees.

Thus, the theory of the prosecution is false and, therefore, the opinions and conclusions and factual findings in the Opinion of the Panel itself contained misconceptions and resulted in erroneous conclusions.

Indeed, as to each of the subissues concerning the substantive definition of "embezzlement" and the failure of the proof, it is crucial to recognize the difference between the corporation and the individual Robert B. Smith III. The failure to do so is a violation of rights protected by the Fifth Amendment Due Process Clause.

The Opinion of the Sixth Circuit three-judge Panel failed to distinguish between the corporation and the individual. See Opinion pp.2, 4-7. This is a major flaw in the foundation of the holding of the Panel that the conviction of embezzlement should not be set aside.

CONCLUSION AS TO INSUFFICIENT EVIDENCE

There was no "misappropriation" (see Opinion pp.5,7); moreover, Smith was not charged with "misappropriation," and there certainly was no embezzlement.

The government first accused Smith of "stealing" the monies or OTMIPs. The government then realized that there was no "theft" and changed its theory of prosecution to accuse Smith personally of "using" the monies (monies repaid by the corporation). In doing so, the government never made a distinction between the corporation and Smith the individual.

There was no crime by Petitioner Smith the "individual" by proof or fact. Instead, payment was delayed by the corporation which Smith discovered. This is not a crime and to label him an embezzler for life is a travesty of justice.

It has often been admitted, that "any experienced prosecutor will admit that he can indict anybody at any time for almost anything, before any grand jury" and this case certainly stands for that principle. See for example *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J.,

dissenting), quoting Judge Campbell of the Northern District of Illinois. It also shows that the modern day grand jury is not the guardian of the people for which purpose it was created at Runnymede. While one thinks of the mail fraud statute as omnipotent and omnipresent, with prosecutors often selecting mail fraud as a convenient tool for pursuing alleged criminal conduct (as in this case), the crime of embezzlement could similarly be considered the "Stradivarius" or "Colt .45" of a government prosecutor. It is indeed the prosecutor's "Uzi" in this case and is misapplied. Petitioner Robert B. Smith III is a good man with a good reputation and he has been maligned by this prosecution and this conviction for embezzlement. The conviction should be reversed: No rational trier of fact could have found him guilty beyond a reasonable doubt. Thus the Due Process Clause was violated.

CONCLUSION

For the foregoing reasons, Petitioner Robert B. Smith III requests that this Court grant certiorari.

Respectfully submitted this 20th day of February, 1997.

/S/_____
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APPENDIX A

FILED
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NOT RECOMMENDED FOR PUBLICATION

No. 95-6219

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM
	)	THE UNITED
	)	STATES DISTRICT
v.	)	COURT FOR THE
	)	WESTERN
	)	DISTRICT OF
	)	TENNESSEE
ROBERT B. SMITH,	)	
Defendant-Appellant	)	

BEFORE: **SILER**, **MOORE**, and **COLE**, Circuit Judges.

No. 95-6219
United States v. Smith

SILER, Circuit Judge. Defendant, Robert B. Smith III, appeals his conviction and sentence for embezzlement under 18 U.S.C. § 657. Smith raises several issues on appeal, including double jeopardy, discovery violations, sufficiency of the evidence, and application of the sentencing guidelines. This court AFFIRMS.

I

Smith was president of Delta Mortgage Company ("Delta") in Jackson, Tennessee. Delta was authorized by the United States Department of Housing and Urban Development ("HUD") to process Federal Housing Administration ("FHA") residential loans under FAH's direct endorsement program. Delta was this required to collect One-Time Mortgage Insurance Premiums ("OTMIPs") during the closing of FHA-insured loans and remit them to HUD.

In April 1992 HUD auditors and Thomas Luke, of the United States Office of the Inspector General, arrived at Delta to investigate whether Smith had embezzled or misapplied OTMIPs. The investigation found that the OTMIP checks were deposited into Delta's escrow account instead of being sent to HUD. The investigation unearthed over $75,000 in OTMIPs that were not paid by Delta. The government contends that Smith retained the OTMIPs for Delta's use and benefit. According to Helen Broyles, a HUD Division of Mortgagee Approval compliance officer, Smith had told her during this investigation that he had kept the OTMIPs to pay for Delta's utilities and rent.

Smith alleged that he discovered that the company had failed to remit the requisite OTMIPs. Consequently, on July 29, 1991, he executed a secured note of $51,169.66 to J.I.

Kislak Mortgage Corporation ("Kislak"), for which Kislak was to cover the omitted OTMIPs. On September 3, 1991, Smith executed a similar note of $29,500 to the United States Mortgage Servicing Corporation ("USMSC"). Both Kislak and USMSC were among companies that had transacted to buy loans that Delta had processed.

Smith was indicted and convicted on several cousnts of embezzlement. He was sentenced to twenty-two months imprisonment and three years supervised release.

II

Smith first argues that the criminal conviction violated his double jeopardy rights because he had been punished previously in an administrative civil proceeding. Following his indictment, Smith was barred by HUD from doing business with the United States government as a result of his failure to remit the OTMIPs, grounds that proved to be the basis of his criminal conviction. Smith argues that his conviction was subsequent punishment, placing him in double jeopardy.

The primary basis of Smith's argument rests on precedent that has since been overruled. *See United States v. Ursery*, 116 S. Ct. 2135 (1996) (holding that civil forfeitures are not punishments for double jeopardy purposes). In any case, the removal of Smith by HUD was a remedial penalty (protecting the publid) and thereby not subject to the strictures of double jeopardy. *See, e.g., DiCola v. Food & Drug Admin.*, 77 F.3d 504 (D.C. Cir. 1996) (holding that order of FDA that debarred defendant from providing services to the pharmaceutical industry after he was convicted of adulterating a drug product did not violate double jeopardy); *United States*

v. Bizzell, 921 F.2d 263 (10th Cir. 1990) (ruling that penalty of disbarment from HUD activities is strictly remedial). "It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition." *Bizzell*, 921 F.2d at 267. The district court properly determined that Smith's double jeopardy rights were not violated.

III

Smith argues that the evidence was insufficient to sustain his embezzlement conviction. This court must sustain the jury's determination so long as the conviction is supported by substantial evidence. *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983). The indictment charged that Smith, "acting as agent[] for [HUD] . . . with the intent to injure and defraud [HUD], did knowingly and willfully embezzle and purloin a check made payable to [HUD] in violation of Title 18, United States Code, Section 657."

First, Smith claims that the government did not properly prove agency. Broyles testified that Delta was an "approved direct endorsement lender." She explained that a "direct endorsement lender is really an extension of HUD. They have the authority to originate and close FHA loans without any review by [HUD]. They do the full package." An employee with USMSC corroborated that Smith was an "authorized FHA-approved agent." Smith's actions on behalf of Delta substantially support the jury determination that he was a HUD agent.

Second, Smith argues that the government failed to

prove that any embezzling occurred. "Embezzlement is 'the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come.'" *United States v. Homes*, 611 F.2d 329, 331 (10th Cir. 1979) (quoting *Moore v. United States*, 160 U.S. 268, 269 (1895)). The parties stipulated that the checks at issue in this case were made out to HUD, forwarded to Delta, and deposited into Delta's "FHA Escrow Account." A Delta representative would then write checks on this trust account to HUD in the same amount, put photostatic copies of the checks in the files that would go to companies that had purchased the loans to indicate that the OTMIP had been paid, and void the checks. A letter by Smith indicated that when he "finally realized that a number of [OT]MIP checks werestill in our files, and we didn't have enough cash in that account to cover them, I began to hold to [OT]MIP checks on new closings and then release an [OT]MIP for similar amount on a previous closing." In and of itself, this letter is an admission that money that did not belong to Delta--which Delta held on behalf of HUD--was misappropriated.

Smith argues that the money was not used for personal benefit and therefore cound not sustain the embezzlement charge. Smith admitted that money placed in the escrow account was withdrawn. Broyles testified that Smith told her that this money was used to cover business expenses. In essence, a clear inference could be made that Smith "fraudulently converted property entrusted to him by another" and used it for his own purposes. *See United States v. Young*, 955 F.2d 99, 103 (1st Cir. 1992) (suggesting that embezzlement can take on a myriad of forms). This element of embezzlement was supported by substantial evidence.

Third, Smith argues that the government failed to

prove that he intended to defraud and injure HUD. "[I]ntent to injure or defraud . . . can be inferred from the facts and circumstances adduced at trial." *United States v. Woods*, 877 F.2d 477, 480 (6th Cir. 1989). At trial it was shown that Smith took checks made out to HUD and deposited them in Delta's escrow account. Smith conceded that at a later time, the escrow account could not cover the amounts deposited in that account. Smith told Broyles that the money was paid to cover business expenses. A jury could find that under such circumstances, the "irregularites" in the bookkeeping constituted an intent to defraud. At the very least, making photostatic copies of checks that were subsequently voided shows that affirmative action beyond mere negligence took place.[1] The jury could properly infer intent from the

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[1] Other circumstances also evidence intent. A USMSC employee testified that Smith did not respond to her inquiries about the missing OTMIPs until she threatened to contact the FHA. *See Young*, 955 F.2d at 103-04 (noting that delays in resonding to inquiries could evidence knowledge that one was fraudulently converting money). Moreover, Smith's letter to USMSC certainly leads one to the conclusion that he knew about problems and tried to manipulate the situation to stay in business:

> After discovering what a mess I had blundered into about a year ago, I have lived I fear of the consequences. I am an extremely knowledgeable financial person, and I am very aware of the precarious position in which I find myself . . . . I have lived in fear, frustration and terror for the last year by not knowing if your firm would work with me. It is my opinion that if you will work with me, everyone will be satisfied.

testimony at trial.

Finally, Smith argues that any embezzlement that did occur was not "willful." *See United States v. Williams*, 478 F.2d 369, 373 (4th Cir. 1973) ("The government must show that the [embezzlement] acts were done willfully and intentionally, not by inadvertence or carelessness."). Specifically, Smith argues that he did not know he was violating the law. However, when he received a check, he deposited it into Delta's account, wrote a check to HUD, made a photostatic copy of it, sent it to the purchasers of the loan, and voided the check. Clearly, this evidence is sufficient for a jury to find that he acted willfully.

It does not strain credibility that a jury could conclude that Smith misdirected money, which belonged to HUD, to his own company. The jury could conclude that Smith acted fraudulently because he "covered his tracks" by making photostatic copies of checks that were to be voided. Even if Smith's intent was to pay this money back, as evidenced by his letters, the misappropriation is enough to constitute a criminal violation. *See Young*, 955 F.2d at 104. Smith has not met his "heavy burden" that the evidence was insufficient to sustain his guilty verdict. *See United States v. Vannerson*, 786 F.2d 221, 225 (6th Cir.), *cert. denied*, 476 U.S. 1123 (1986).

IV

Smith alleged that discovery violations denied him a fair trial. Broyles had written a statement of her conversations with Smith that occurred during her investigation and sent the statement to "archives in Washington," where it was lost in the netherworld of the

federal bureaucracy. Under Federal Rule of Criminal Procedure 16 and the Jencks law, 18 U.S.C. § 3500, Smith was entitled to this statement. He alleges thatthe failure to produce this statement was prejudicial in that it could have been used to impeach her or Luke and might have affected Smith's plea. *See United States v. Meisch*, 370 F.2d 768, 772 (3d Cir. 1966) (noting that statements have an impeachment function and an informational function). Thus, he contends that the district court erred in not awarding him a new trial or a mistrial.

A district court's treatment of a failure to disclose a statement to the defendant under Rule 16 is reviewed for abuse of discretion. *United States v. Glover*, 846 F.2d 339, 342 (6th Cir.), *cert. denied*, 488 U.S. 982 (1988). The district court ruled that

> [t]he witness took a statement from the defendant. This witness reduced that statement to writing. That written statement should have been produced to the defendant. But if it has not, then the remedy for that failure to produce is that this witness cannot testify about anything in this statement that was not disclosed.

A harsher remedy was not warranted. Smith was able to question Broyles outside the presence of the jury. *See United States v. Bartle*, 835 F.2d 646, 650 (6th Cir. 1987) (noting that a recess or continuation can often cure the failiure to disclose), *cert. denied*, 485 U.S. 969 (1969). Smith was able to use her testimony to impeach Luke. Any evidence submitted outside of Luke's narrative was initiated by Smith.

The district court did not abuse its discretion.

V

Smith's final argument relates to the district court's application of the Sentencing Guidelines to his sentence. Smith argues that because there was no loss, he should have received a base offense level of four. The presentence report added an eight-level increase for a loss of moer than &70,000. *See* USSG § 2B1.1(b)(1)(I). The district court reduced the loss to $61,000, a seven-level increase, because Smith had paid some of the money that was embezzled

The crux of Smith's argument appears to be that his crime--embezzling money as a HUD agent--produced no HUD losses. The OTMIPs has been paid, albeit late, by the mortgage purchasers. Thus, according to Smith, HUD suffered "delays" rather than "losses."

There was sufficient testimony concerning the dollar amount of the mortgage isurance premiums that were not paid by Delta. "'Loss' means the value of the property taken." USSG § 2B1.1, comment. (N.2). Smith does not assert that he paid back the full amount of the OTMIPs that he deposited. He does not contest the amount of money that was taken. The guidelines focus on the amount taken rather than the amount *suffered*. The district court did not misapply the sentence. Smith's arguments relating to sentencing are without merit.

AFFIRMED.

APPENDIX B

FILED
October 23, 1996
Leonard Green, Clerk

No. 95-6219

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
ROBERT B. SMITH,	)	
Defendant-Appellant	)	

BEFORE: SILER, MOORE, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is DENIED.

ENTERED BY ORDER OF THE COURT

/S/_____
LEONARD GREEN, CLERK

APPENDIX C

AMENDMENT V

CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or pubic danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.